

LEGAL REVIEW NOTE

LC#: LC1617, To Legal Review Copy, as of February 14, 2013.

Short Title: Revise laws related to state and local government infrastructure on state lands

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC1617, as drafted, directs the Department of Natural Resources and Conservation (DNRC) to transfer, without compensation, a historic right-of-way deed over state trust lands to a person or county that submits an application and an application fee to the department. LC1697, as drafted, eliminates the requirement for a person or county to pay full market value of the acreage of historic rights-of-way over state trust land. LC1697 may raise potential conformity issues with the Organic Act of the Territory of Montana, The Enabling Act, and the Montana Constitution.

Prior to statehood, the U.S. Congress enacted the Organic Act of the Territory of Montana that provided a temporary government for the Territory of Montana. *The Organic Act of the Territory of Montana*, 13 Stat. 91, 1861-1865. Section 14 of the Act provided that:

sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same. *Organic Act* at section 14.

In 1889, Montana was admitted into the Union under the Omnibus Enabling Act of 1889. *The*

Enabling Act, 25 Stat. 676 (1889). Upon admission, Congress granted Montana the sixteenth and thirty-sixth sections of each township within Montana "for the support of common schools." *Enabling Act*, at section 10. Montana also received additional grants of acreage for other educational and state institutions.

The Enabling Act, in tandem with the Montana Constitution, imposes fiduciary responsibilities on the state with regard to state trust land. In 1999, the Montana Supreme Court provided the overarching framework for those fiduciary responsibilities. *Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners*, 296 Mont. 402, 989 P.2d 800 (1999) (cited as *Montrust*). The Court in *Montrust*, citing a litany of prior Montana Supreme Court cases, noted that the federal grant of lands to Montana constituted a trust. The terms of the trust are set forth in the Montana Constitution and The Enabling Act. Montana's 1889 Constitution accepted the lands from the federal government and provided that those lands would be held in trust consonant with The Enabling Act, and the 1972 Montana Constitution continued those terms. The State of Montana is the trustee of those lands. The Board of Land Commissioners is the instrumentality created to administer that trust and is bound upon principles that are elementary in order to secure the largest measure of legitimate advantage to the beneficiary. The Board owes a higher duty to the public than does an ordinary businessman. Montana's constitutional provisions are limitations on the power of disposal by the Legislature. One very important limitation on the Legislature in the power of disposal is the trust's requirement that full market value be obtained for trust lands.

The Montana Supreme Court has also held that the state as the trustee has an undivided loyalty to the beneficiaries of the trust. *Wild West Motors, Inc. v. Lingle*, 224 Mont. 76, 728 P.2d 412 (1986). The Court noted:

When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts which require a standard with a "punctilio of an honor the most sensitive." . . . A trustee must act with the utmost good faith towards the beneficiary, . . . and may not act in his own interest, or in the interest of a third person.

The Court has also determined that the Board and the DNRC must have large discretionary power in managing state trust lands, but that discretionary power is not unlimited and must conform to the trust, and that discretionary power must be consistent with the Constitution. See *State ex rel. Evans v. Stewart*, 53 Mont. 18, 161 P. 309 (1916); *Toomey v. State Board of Land Commissioners*, 106 Mont. 547, 81 P.2d 407 (1938); *State ex rel. Thompson v. Babcock*, 147 Mont. 46, 409 P.2d 808 (1966).

The Board of Land Commissioners has the constitutional authority "to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law." Article X, section 4, of the Montana Constitution. The Montana Constitution sets out the Board's authority regarding public trust land disposition:

Public land trust, disposition. (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) *No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.*

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area. Article X, section 11, of the Montana Constitution (emphasis added).

In addition, The Enabling Act also lays out some terms and conditions regarding state trust land disposition:

That all lands granted by this Act shall be disposed of only at public sale after advertising--tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally valuable for grazing purposes for not less than \$5 per acre .

The said lands may be leased under such regulations as the legislature may prescribe.

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: Provided, however, *That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.* Section 11 of The Enabling Act (as amended by the acts of May 7, 1932, Ch. 172, 47 Stat. 150 (1932), and October 16, 1970, Pub. L. No. 463, 84 Stat. 987 (1970)) (emphasis added)

The Montana Supreme Court has ruled that The Enabling Act must be liberally construed with the view of accomplishing the object sought to be attained. *State ex rel. Morgan v. State Board of Examiners*, 131 Mont. 188, 309 P.2d 336 (1957), overruling *Bryant v. State Board of Examiners*, 130 Mont. 512, 305 P.2d 340 (1956).

Consequently, LC1617, as drafted, may run afoul of Montana Supreme Court precedent and may conflict with the express language in the Montana Constitution and The Enabling Act regarding the requirement that the public land trust receive full market value for any state trust land disposition.

Requester Comments: None